Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

No. 75-9

IN THE

Supreme Court of the United States

October Term, 1975

UNITED STATE OF AMERICA,

Petitioner,

v.

CITIES SERVICE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR CITIES SERVICE COMPANY

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MEMORANDUM FOR CITIES SERVICE COMPANY

The United States, in its petition filed herein, seeks review by this Court of the decision of the United States Court of Appeals for the Second Circuit, but would limit the scope of such review to one aspect of the decision of the Court below, i.e. consideration of the petitioner's contention that original issue discount cannot exist in circumstances as defined and circumscribed by petitioner. Accordingly, in its Memorandum filed in *Cities Service Company* v. *United States,* No. 74-1376, where Cities Service Company has petitioned for a writ of certiorari on the questions of discount on debt issuance, or loss or expense deductions on the subsequent retirement of debt, and the measurement thereof, the United States has opposed the issuance of the writ unless review is confined

to the question of the existence of original issue debt discount where debt securities are exchanged for property or for the securities of the issuing corporation.

While respondent, Cities Service Company, contends that the conclusions of fact and law recited by the United States in its petition are completely unfounded and erroneous and practically all contrary to the findings and conclusions of the courts below, it submits in particular that, contrary to the contention of the United States herein, the decision by this Court in *United States* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, did not hold that debt discount cannot *ever* exist when debt is exchanged for property, or for stock and securities of the issuing corporation. It held that in the context of that particular case debt discount did not, in fact, occur, or if it did occur it could not be properly measured.

The existence of debt discount, or severe financial loss or expense in the instant case, is firmly supported by the record and is irrefutable and unchallengeable. It is the measurement of that discount by the Court of Appeals and its failure to recognize the existence of loss or expense that is novel or controversial. If the Court is disposed to grant a petition for review of the decision of the Court of Appeals for the Second Circuit, however, it should consider all aspects of the case and not just the one narrow view favored by the United States.

It should also be pointed out that in its petition (p. 6) the United States recites that the claim for refund filed by Cities Service Company for 1954 was "denied insofar as it related to bond discount". This is a direct misstatement of fact. Appended hereto is a copy of the Treasury Department notice of disallowance dated November 17, 1966, which advised the taxpayer of the disallowance of its claim or claims in the amount of $468,129.65, which was the

amount referred to in the amended claim as refundable because of the loss suffered upon the repurchase of debentures in 1954. Contrary to the petitioners assertion, the notice of disallowance did not specify that any part or parts of the claim or amended claim was being denied, or even the reason for the disallowance.

In footnote 2 on page 6 of the petition, the United States also implies that the respondent's amended claim was untimely. As pointed out in the reply filed in No. 74-1376, the amended claim was filed on or about February 11, 1966, many months before the statute of limitations expired on June 30, 1967.

Respectfully submitted,

THOMAS E. TYRE
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99 Park Avenue
New York, New York 10016

APPENDIX

FORM L-60 (4-59)
(SEAL)

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
120 CHURCH STREET
NEW YORK, N. Y. 10007
November 17, 1966

CERTIFIED MAIL

IN REPLY REFER TO
D:R:RO

Cities Service Co.
60 Wall Street
New York, N. Y.

IN RE: CLAIM FOR REFUND OF
$468,129.65
FOR THE PERIOD
1954

DLN MF 50010000 Form 1120

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

/s/ EDWARD J. FITZGERALD, JR.
Edward J. Fitzgerald, Jr.
District Director

GPO 951-916